Supreme Court, U.S.
FILED
OCT 15 1996
CLERK

(2)

No. 96-389

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

MARY E. LEONARD

Petitioner,

vs.

TOWN OF BRIMFIELD and CYNTHIA K.POWERS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Judicial Court of Massachusetts correctly determined that Petitioner Mary Leonard, who purchased an undivided piece of land subject to long-standing zoning regulation through a local zoning by-law, did not suffer a compensable "taking" under the Fifth Amendment to the United States Constitution where the Town of Brimfield Zoning Board of Appeals imposed a condition upon its grant of a special permit to Leonard, allowing her to build a residence upon part of her still undivided property, and it was undisputed that the remainder of her property could be used for agricultural, horticultural, and recreational purposes.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional provisions referenced by Petitioner in her Petition for a Writ of Certiorari, the Respondents rely upon the following authorities:

Michigan Constitution, Article VI, Section 1, which provides:

Judicial power in court of justice; divisions. Sec. 1. The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected and serving in each house.

Mass. Gen. L. ch. 40A, §17, which provides, in pertinent part:

Any person aggrieved by a decision of the board of appeals or any special permit granting authority...may appeal to the land court department, [or] the superior court department in which the land concerned is situated...by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk.***

Mass. Gen. L. ch. 41, §81P, which provides, in pertinent part:

Any person wishing to cause to be recorded a plan of land situated in a city or town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such city or town in the manner prescribed by [Mass. Gen. L. ch. 41,] section eighty-one T, and, if the board finds that the plan does not require such approval, it shall forthwith, without a public hearing, endorse thereon...the words "approval under the subdivision control law not required"...and such endorsement shall be conclusive on all persons.***

Section VI-C of the Brimfield Zoning By-law in effect at the relevant times of this action, which provides that:

1. In a Flood Plain District, uses otherwise permitted as set forth in Section IV-A through IV-B above may be authorized after a finding by the Board of Appeals, after a hearing with due notice given, that said use will not endanger the health or safety of the occupants thereof.

STATEMENT OF THE CASE

A. Procedural History

This petition for writ of certiorari arises out of one of three cases brought by Petitioner Mary Leonard [hereinafter "Leonard"] against the Respondent Town of Brimfield

[hereinafter "Town"].[1] Those cases are:

1. *Mary E. Leonard v. Town of Brimfield*, Hampden Superior Court C.A. No. 87-592 (filed April, 1987). This case alleged that the Town maintained multiple culverts which discharged unreasonable and unnaturally large volumes of water onto Leonard's property, thus resulting in a nuisance. This case was settled by agreement of the parties in consideration of $60,000.00, with a Release granted by Leonard to the Town (Record Appendix at p. 19-20 [hereinafter "R.A. _____"][2]; see also Petitioner's Appendix at p. A3-A4 [hereinafter "Pet. App. __"]).

2. *Mary Leonard v. Brimfield Zoning Board of Appeals*, Hampden Superior Court C.A. No. 87-1077 (filed April, 1987). This case appealed as unlawful, arbitrary and capricious the June 2, 1987 decision of the Brimfield Zoning Board of Appeals granting a Special Permit with conditions, allowing Leonard to build above the 370 foot-elevation line. After a jury waived *de novo* trial held on October 6-7, 1987, the superior court affirmed the Board's decision. (R.A. 40-42). Leonard appealed to the Massachusetts Appeals Court, which affirmed the lower court's decision, 27 Mass. App. Ct. 1408 (1989). (R.A.

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[1] Cynthia Powers, the other named Respondent, is only nominally considered as part of the Petition for Writ of Certiorari and the challenged state court decision.

[2] For this Court's convenience, all Record Appendix references are reprinted in "Appendix A," *infra*, with the exception of the Town of Brimfield Zoning Map, contained at R.A. p. 177.

165; Pet. App. A3). Further appellate review was denied by the State's highest court, the Massachusetts Supreme Judicial Court, on August 17, 1989, 405 Mass. 1204 (1989). (R.A. 165; Pet. App. A3).

3. *Mary E. Leonard v. Town of Brimfield and Cynthia K. Powers, Individually and as Chairperson of the Brimfield Conservation Commission*, Hampden Superior Court C.A. No. 87-1238 (filed July, 1987). This case alleged that the Town's enforcement of its zoning by-law effected a "taking" of Leonard's land, and violated her civil rights. After trial, the superior court found in favor of the defendants (R.A. 163-168; Pet. App. A6), and Leonard appealed to the Massachusetts Appeals Court. (R.A. 179). The Supreme Judicial Court transferred the case from the Appeals Court on it own initiative, and rendered a decision on July 11, 1996 (Pet. App. A1), affirming the trial court's decision in favor of the Town. Leonard then filed this petition for writ of certiorari.

B. The Record Below

Upon review of Leonard's Petition, it is evident that her real complaint lies, not with the Supreme Judicial Court's decision but with her own failure at trial to introduce sufficient evidence to support her claims. In an effort to create an appellate issue, Leonard relies upon a series of factual allegations in her petition that simply are not part of the record below, were not adduced at trial in the underlying case, and cannot provide a basis for review by this Court.

Background Facts

In 1986, Leonard purchased an approximately 16-acre lot located in Brimfield, Massachusetts (R.A. 59-60), in an area zoned as the "Flood Plain District" as noted on the Town of Brimfield's Zoning Map. (R.A. 172, 177). Under Brimfield Zoning Bylaw Section VI-C (Flood Plain Restrictions), no building permit could issue without Leonard first obtaining a special permit from the Brimfield Zoning Board of Appeals [hereinafter "ZBA"]. (R.A. 171, 175). Leonard applied for a building permit from the Building Inspector, and in fact received such a permit, but it was later revoked when the Building Inspector determined that the property was located in the Flood Plain District. (R.A. 171-172).

Leonard accordingly applied to the ZBA for a special permit (R.A. 171, 175), and after a public hearing held on May 4, 1987, the ZBA granted Leonard a special permit, with conditions [hereinafter "the ZBA's June 2, 1987 Special Permit"]. (R.A. 164, 175-176). The ZBA made specific findings of fact, including that Leonard's lot had an elevation of 360 feet (above sea level) in the vicinity of the river, to approximately 400 feet at the most northeasterly corner of the lot, with a large portion of the lot lying at elevations of 360 to 365 feet. (R.A. 175). Within this area of 360-365 foot elevation, the ZBA determined that extensive wetlands existed. (R.A. 175). The ZBA further found that flood crest levels of the river would create a hazard at the 360-365 foot elevation, and that septic systems located at this elevation would be rendered useless at flood

crest levels and most likely would contribute pollutants to the environment. (R.A. 175). Finally, the ZBA noted that the domestic water supply would be threatened at flood crest levels and due to septic system failures. (R.A. 176).

Based upon these findings, the ZBA determined that building within the 360-365 foot elevation area would endanger the health and safety of the occupants, affect the environment, and possibly endanger neighboring inhabitants. (R.A. 175). Despite the potential harm posed, the ZBA felt that prohibiting property use for the entire property would be "extreme and unfair" to Leonard. (R.A. 176). Therefore, the ZBA *granted* Leonard a special permit, conditioning the approval upon the restriction that construction on the property be limited to land located at and above the 370-foot elevation mark, a five-foot safety factor from the 360-365 foot elevation. (Pet. App. A3; R.A. 176). Approximately 6 acres of the 16-acre lot were available for building. (Pet. App. A3). Leonard built her house on the property within that portion of the land above the 370-foot elevation mark. (*See, e.g.*, Pet. App. A13; R.A. 93).

Leonard first appealed the ZBA's decision as "discriminatory, unreasonable, and arbitrary," to the Hampden County Superior Court, pursuant to Mass. Gen. L. ch. 40A, §17 (*see* Procedural History, Section A.2, above). (R.A. 40-42, 165). After trial, the judge upheld the ZBA's decision. (R.A. 40-42). Leonard then appealed the trial court's decision to the Appeals Court, which affirmed the lower court's ruling, 27 Mass. App. Ct. 1408

(1989). (R.A. 165). Further appellate review was denied by the Supreme Judicial Court on August 17, 1989, 405 Mass. 1204 (1989). (R.A. 165). Following the exhaustion of these appeals, Leonard built her house on that portion of the lot located above the 370-foot elevation mark. (R.A. 93).

At the same time she was appealing the ZBA's decision, Leonard filed two other actions in Hampden County Superior Court, as previously noted. One of these actions was settled by the parties (*see* Procedural History, Section A.1, above), and the second action (*see* Procedural History, Section A.3, above), forms the basis for the present Petition for Writ of Certiorari.

Factual and Legal Mischaracterizations

Perhaps the best way to identify the numerous mischaracterizations of fact and law Leonard makes in her Petition is to emphasize what this case does not involve. First, this case is not about the Town's (ZBA's) purported "decision to enforce a one thousand (1,000) year flood plain zone." (Petition at 3-4, 7). Leonard concedes that the validity of the ZBA's June 2, 1987 Special Permit "is not at issue." (Petition at 25). Nor could it be, as the doctrine of *res judicata* bars Leonard's efforts at this stage to relitigate the propriety of the ZBA's actions. The legal validity and enforceability of the ZBA's June 2, 1987 Special Permit was affirmed by three competent reviewing courts, through to the Massachusetts Supreme Judicial Court [hereinafter "SJC"], which, as noted, denied further appellate review on

August 17, 1989.

Moreover, the record evidence does not support, even marginally, Leonard's bare assertion that the ZBA imposed a "one thousand (1,000) year flood plain zone for the first time, and required a special permit to build in this flood plain (at any elevation) for the first time...." (Petition at 25). There is *no* evidence on the record that the 370-foot elevation mark represents a one thousand year flood plain zone, and Leonard has pointed to no such record evidence (*see, e.g.*, Petition at 7-8 n.4), except her own extrapolation on appeal, that if 360 feet represents the 100 year flood plain and 365 feet represents the 500 year flood plain, then 370 feet must represent the 1,000 year flood plain. There is simply no evidence on the record to support this presumption. There is no evidence from the record below that any witness provided the engineering, geological, or topographical foundation for such an extrapolation. The record below does not even contain a simple statement by any witness that the 370-foot elevation represents the 1,000 year flood plain. Perhaps more tellingly, even Petitioner's *complaint* and *pre-trial memorandum* fail to identify a 1,000 year flood plain zone. (R.A. 3-9, 10-16).[3]

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[3] Leonard herself is not consistent on the issue of what a 370-foot elevation represents. In some instances, such as in her petition, she contends that it is equivalent to a 1,000 year floor plain. In others, such as her pre-trial memorandum (R.A. 13-14), Leonard asserts that it is equivalent to a 1,200 year flood plain. Finally, in her complaint, Leonard merely states that the 370-foot elevation resulted in a flood plain zone that "substantially exceed[ed]" the 500 year flood plain. (R.A. 4).

This case also does not involve multiple subdivided lots. (Petition at 4-5, 9-10). The trial record clearly establishes that Leonard had not filed with the Brimfield Planning Board a plan subdividing her land, as required under Mass. Gen. L. ch. 41, §81P, at the time she applied for a special permit. (Petition at 5; Pet. App. A12). The property was therefore undivided at all relevant times to her claim: at the time she petitioned the ZBA for a Special Permit (May 4, 1987); at the time the ZBA issued its Special Permit (June 2, 1987); and at the time she commenced the instant suit (July 8, 1987) (R.A. 9). The trial judge properly made a *factual* determination that at the time Leonard commenced this underlying lawsuit, "the subject property was a single 16-acre lot and the [Petitioner] had taken no action to subdivide her property." (Pet. App. A24). This determination was upheld by the SJC as supported by the record. (Pet. App. A12).

Finally, as stated above, this case is not about an error of law by the SJC in applying a takings analysis under federal law. That court, in fact, adopted completely Leonard's version of federal case law, and her proffered legal analysis (the so-called "three-pronged test"). *Cf.* Brief of Mary E. Leonard, p. 22, *et seq.* and SJC's analysis, Pet. App. A8.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW OF THE QUESTION PRESENTED, BECAUSE THE PETITION, AT BEST, MERELY CONTESTS THE SUPREME JUDICIAL COURT'S APPLICATION OF THE LEGAL STANDARD ARGUED BY LEONARD TO FACTUAL DETERMINATIONS MADE AFTER TRIAL AND UPHELD ON APPEAL.

A. Under The Supreme Court's Rules, A Writ Of Certiorari Is Rarely Granted Where The Error Asserted Consists Of Erroneous Factual Findings Or Misapplication Of A Properly Stated Rules of Law.

Rule 10 (last ¶) of the Rules of the Supreme Court provides that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Here, Petitioner challenges exactly what the Supreme Court has cautioned will *not* be generally considered appropriate for certiorari review: factual findings and the Massachusetts Supreme Judicial Court's application of a standard proffered by Leonard herself. The Petition for Writ of Certiorari should therefore be denied.

B. Leonard Does Not Challenge The Standard Of Review Applied By The SJC, But Only Its Application To The Facts.

The three factors discussed by the SJC in determining whether a compensable taking had occurred were the same three factors argued by Leonard as the appropriate standard of review in takings claims under federal law. *See* Brief of the Plaintiff-Appellant, at p. 13, *Leonard v. Town of Brimfield, et al.*, 423 Mass. 152 (1996) (No. SJC-07008). Specifically, the SJC addressed the "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" (Pet. App. A8). Leonard does not challenge that standard here. (Petition at 16).

Rather, what Leonard really argues is that the SJC misapplied her own proffered "standard" and made erroneous factual findings against her. For instance, the SJC applied the "distinct investment-backed expectations" prong proposed by Leonard, and concluded that on the facts, her expectations were not reasonable, because they were made without considering the pre-existing zoning restrictions on the property. (Pet. App. A9-A14). *Accord Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). Implicit in the SJC's determination is the fact that the *record evidence was insufficient* to show that any economic impact Leonard allegedly suffered was severe. (Pet. App. A9-A14). Any analysis of the SJC's

decision will therefore be a fact-bound determination, requiring extensive examination of the record below. Thus, this case presents a poor vehicle for analyzing the question presented. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-112 (1980) (Supreme Court customarily accepts factual findings of state courts in the absence of "exceptional circumstances") (citing *Lloyd A. Fry Roofing Co., infra*). A petition for a writ of certiorari should not be granted where, as here, the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law. Supreme Ct. R. 10.

Should the Court accept this case for review, it would find that the record cannot support a finding that a compensable taking occurred. This would be particularly evident on the essential fact questions regarding valuation of the subject property. Assuming *arguendo* that Leonard's investment backed expectations were reasonable in light of the preexisting zoning restrictions, the record contains no comparative "before and after" valuation evidence from which a reviewing court could determine the economic impact of the ZBA's June 2, 1987 Special Permit. The only valuation evidence to be found in the record is trial testimony from Leonard's expert about the supposed value of subdivided building lots. The record is fatally silent about whether this supposed value is greater than, or less than, the agricultural, horticultural or recreational alternatives. In fact, there is no record evidence to support even a finding that Leonard's inability to build on certain portions of the property due to the 370 foot elevation

restriction decreased the value of the property, in light of the other available uses listed above. It will, therefore, be impossible for any reviewing court to reach any supportable conclusions about the economic impact upon Leonard, if any, of the ZBA's June 2, 1987 Special Permit.

This lack of evidence was recognized by the SJC, which stated in its decision: "the evidence was insufficient to show that the economic impact was severe." (Pet. App. A13). Leonard's failure of proof at the trial level presents an incurable flaw to the worthiness of this case for certiorari review, and this Court should deny Leonard's Petition.

Finally, Leonard contends that the ZBA's actions "should be deemed a 'taking' because it was *discriminatory*...." (Petition at 27 [emphasis added]). In her argument, Leonard suggests, without any supporting citation to the record, that the present case "was the first time that Brimfield enforced its flood plain zone." (Petition at 24). Regardless of whether this assertion has any relevance to a takings analysis, the issue was not fully or properly developed on the trial record, as indeed it should not have been pursuant to the doctrine of *res judicata*. The claim that the ZBA's June 2, 1987 Special Permit was arbitrary, capricious or discriminatory had previously been litigated through to a final conclusion. (*See* Procedural History, Section A.2, above; *see also* Pet. App. A70-A75). Leonard's efforts to color in that fashion the trial below were properly objected to as being barred by the doctrine of *res judicata* and sustained by the trial judge. (*See, e.g.* R.A. 109-110). Furthermore, the SJC correctly noted in its

decision that "the validity of the Board's enforcement of this zoning by-law has been adjudicated." (Pet. App. A7). Should this Court grant Leonard's certiorari petition, it would find that, as is also the case with the question of proving severe economic impact, the determination of discriminatory effect upon Leonard would be at best an exhausting fact-bound exercise, and at worst, a task made impossible by the incompleteness of the record. This case is a completely inappropriate vehicle for the question presented, and accordingly, the Court should deny Leonard's Petition.

II.

THE PETITION FOR WRIT OF CERTIORARI FAILS TO IDENTIFY AN APPELLATE ISSUE OF SUFFICIENT GENERAL IMPORTANCE TO JUSTIFY THE GRANT OF CERTIORARI.

A. The Michigan Court Of Appeals Decision Relied Upon By Leonard Is Not A Decision Of A State Court "Of Last Resort" And, In Any Event, Does Not Conflict With The Decision Of The Massachusetts Supreme Judicial Court.

Rule 10 of the Rules of the Supreme Court provides that a petition for writ of certiorari will only be granted for "compelling reasons." In considering whether to grant certiorari, this Court considers whether "a state court *of last resort* has decided an important federal question in a way that conflicts with the decision of *another state court of last*

resort ... Supreme Ct. R.10(b) [emphasis added]. Apparently in an effort to fit within this provision of the Rules, Leonard proffers a Michigan Court of Appeals decision, *K&K Construction, Inc., J.F.K. Company, and Resorts and Company v. Department of Natural Resources and Michigan Association of Home Builders*, 217 Mich. App. Ct. 56 (1996), which she claims "directly conflicts with the reasoning of the Massachusetts [Supreme Judicial] Court ...." (Petition at 12). This argument is both irrelevant and unpersuasive.

First, it is plainly irrelevant because the Michigan Court of Appeals is *not* the court of "last resort" in the State of Michigan. Michigan Constitution, Article VI, §1. In fact, the Clerk's Office for the Michigan Supreme Court has advised that an application for leave to appeal this decision is currently pending before the Michigan Supreme Court. A copy of the cover page of the Application for Leave to Appeal is included in the Town's "Appendix B," *infra*. This Court should not exercise its discretion and expend limited judicial resources to review a case which cannot even reach the threshold showing of a reviewable conflict.

Secondly, Leonard's argument is unpersuasive because even if the decision were from Michigan's court of last resort, the decision on its face does not conflict with the SJC's decision in one critical respect. In *K&K Construction*, the Michigan Court of Appeals addressed a takings claim where the trial court made a factual determination that the property at issue was rendered "essentially worthless as commercial real estate" by

restrictions under the Michigan Wetlands Protection Act. (Pet. App. A35; *see also* 27 Mich. App. Ct. at 60). Determining that this factual finding was not clearly erroneous, the *K&K Construction* court analyzed the takings issue pursuant to both federal and state authorities in which a claimant was denied all economically viable (or beneficial or productive) use of the property as a result of governmental regulation. (Pet. App. A39-A40, A55; *see also* 27 Mich. App. Ct. at 61-62, 68-67).

In contrast, the SJC decision challenged herein did not involve or establish a deprivation of all "economically viable" or "economically beneficial or productive" use of Leonard's property. The record indicates that Leonard was allowed to build a house on her property, and additionally, that the entire property is suitable for agricultural, horticultural and recreational purposes, and in fact, had been used for agricultural purposes prior to Leonard's purchase of the land. (R.A. 93-94; *see also* Pet. App. A13). Furthermore, as noted earlier, it cannot even be established from the record whether those viable alternative uses were of greater or lesser value to Leonard.

This is a critical distinction because if the Court wishes to review claims for takings damages in instances of less than a total "deprivation of all economically feasible use," *see Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016-1017 n.7, this case is not the appropriate vehicle to do so. Because the facts are totally distinguishable on the key point, the Michigan Appeals Court and Massachusetts SJC decisions do not present clear

conflicting issues of federal law ripe for review by this Court.

B. Because Leonard Has Not Challenged The Legal Standard Applied By The Supreme Judicial Court, And Because Factual Deficiencies In The Record Preclude Any Result Other Than That Reached By The Supreme Judicial Court, Any Opinion Issued By This Court On The Merits Would Constitute An Impermissible Advisory Opinion.

As discussed above (Section I., *supra*), Leonard has not challenged the legal standard articulated by the SJC in its analysis of the regulatory takings claim, and in fact was the party who proffered this standard on appeal from the trial court's decision. Brief of the Plaintiff-Appellant at p. 13-14, *Leonard v. Town of Brimfield, et al.*, 423 Mass. 152 (1996) (No. SJC-07008). Furthermore, also as discussed above, Leonard failed to adduce sufficient evidence at trial to support her takings claim, under *either* the standard of review applied by the trial court or by the SJC. Leonard essentially asks this Court to readjudicate the factual findings of the trial court, which this court should not do except in exceptional circumstances. *See Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Grayson v. Harris*, 267 U.S. 352, 358 (1925) [citations omitted]; *Portland Ry. Co. v. Railroad Commission of Oregon*, 229 U.S. 397, 412 (1913). (the Supreme Court will not generally reexamine state court findings and conclusions of fact). As this Court has plainly stated: "We do not grant certiorari to review evidence and discuss specific facts."

United States v. Johnston, 268 U.S. 220, 227 (1925). Leonard's petition asks the Court to do just that, and it should therefore be denied.

Should this Court grant certiorari, it will be called upon to render in substance an advisory opinion. It is well established that the Supreme Court's power is to "correct wrong judgments, not to revise opinions." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)). In construing its own authority, this Court has noted that "[w]e are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Id.* Leonard's petition seeks just this. Leonard calls upon the Court to apply the same "three-pronged test" which she advocated below and which was accepted by the SJC to a factual record which, because she so improperly and incompletely developed it at trial, could only serve to support the SJC's decision. Leonard's Petition for a Writ of Certiorari should be denied.

III.

LEONARD'S EFFORTS TO RE-LITIGATE THE FACTUAL FINDINGS OF THE LOWER COURT WITHOUT A SUBSTANTIAL BASIS FOR APPELLATE REVIEW BY THIS COURT RENDERS THIS A FRIVOLOUS APPEAL.

Rule 10 of the Rules of the Supreme Court provides that a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Leonard was successful in persuading the SJC to adopt the "three-pronged test" which she proffered, but she could not muster the facts to get the ultimate result she desired. Her petition falls squarely into the category rarely granted under Rule 10.

Her petition also is frivolous because she flatly failed to establish any conflict within the meaning of Rule 10(a)-(c). The Michigan Court of Appeals is not a court of "last resort" within the meaning of the Rule, and the case Leonard relies upon is currently pending before Michigan's Supreme Court. Even if the Michigan decision had reached a court of "last resort," the two decisions are so factually distinguishable on the key inquiry in regulatory takings analysis - the extent of economic deprivation - that they still present no meaningful conflict. Leonard's representation or implication to the contrary is without merit. If there were other "compelling reasons" for accepting this case for review, Leonard has failed to identify them.

Finally, Leonard's petition is frivolous because it is nothing more than a transparent attempt to re-litigate her failed "1,000 year flood plain" crusade, which was long ago properly laid to rest. In an apparent attempt to gain the sympathy of this Court, Leonard riddles her Petition with references to the so-called "1,000 year flood plain," a reference which is unsupported by the record below, about which she herself has been factually inconsistent, and which she *concedes* in her Petition "is not at issue." (Petition at 25). This disingenuous tactic failed at the trial level. It also failed before the SJC. In light of these repeated failures and her concession that it is "not at issue," it is frivolous for Leonard to reincarnate her 1000 year flood plain crusade before this Court.

An appeal is frivolous if the result is obvious or the arguments advanced are wholly without merit. *See, e.g., Stelly v. C.I.R.*, 761 F.2d 1113 (5th Cir. 1985), *cert. denied*, 474 U.S. 851; *Kehr v. Smith Barney, Harris Upham & Co., Inc.*, 736 F.2d 1283 (9th Cir. 1984). The Town has expended significant funds from the public fisc over the past nine years in successfully defending the ZBA's June 2, 1987 Special Permit, and Leonard's continued efforts to challenge the validity of the ZBA's action, disguised now as a takings claim, supports a finding that her Petition is frivolous. The Town, therefore, is entitled to its costs and any other "just damages" as determined by this Court pursuant to Rules 42 and 43 of the Supreme Court.

CONCLUSION

The Massachusetts Supreme Judicial Court correctly held that the Petitioner had not established a compensable governmental "taking" of property under the Fifth Amendment of the United States Constitution. Moreover, Petitioner has failed to identify an appellate issue worthy of consideration by this Court, as she seeks only to readjudicate factual determinations long since established by the Massachusetts trial court. Therefore, the Respondents respectfully request that this Court deny the Petition for a Write of Certiorari.

Respectfully submitted,

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